APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/076,029	02/12/2002	Stephen Patrick Simon	18360/233698	7382

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EXAMINER
MEINECKE DIAZ, SUSANNA M

ART UNIT	PAPER NUMBER
3623	

DATE MAILED: 09/28/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE _3_ MONTH(S) FROM
THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1) ☒ Responsive to communication(s) filed on _09 August 2004_.

2a) ☒ This action is **FINAL.**   2b) ☐ This action is non-final.

3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4) ☒ Claim(s) _1-9,32-36,49-52 and 71-73_ is/are pending in the application.

    4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5) ☐ Claim(s) _____ is/are allowed.

6) ☒ Claim(s) _1-9,32-36,49-52 and 71-73_ is/are rejected.

7) ☐ Claim(s) _____ is/are objected to.

8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9) ☐ The specification is objected to by the Examiner.

10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.

    Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

    Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

    a) ☐ All b) ☐ Some * c) ☐ None of:

      1. ☐ Certified copies of the priority documents have been received.

      2. ☐ Certified copies of the priority documents have been received in Application No. _____.

      3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

    * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☐ Notice of References Cited (PTO-892)

2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)

3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
    Paper No(s)/Mail Date _____.

4) ☐ Interview Summary (PTO-413)
    Paper No(s)/Mail Date. _____.

5) ☐ Notice of Informal Patent Application (PTO-152)

6) ☐ Other: _____.

DETAILED ACTION

1.   This Final Office action is responsive to Applicant's amendment filed August 9,

2004.

Claims 10-31, 37-48, 53-70, and 74-78 have been cancelled.

Claims 1-9, 32-36, 49-52, and 71-73 are presented for examination.

Response to Arguments

2.   Applicant's arguments filed August 9, 2004 have been fully considered but they

are not persuasive.

Applicant argues:

> In summary, the E-business article simply describes a
> milkman-type arrangement, where customers can request to
> be added to standard delivery routes, but are not provided
> with the ability to specify when any of the deliveries would be
> made. Because, in this type of arrangement, the company
> making the deliveries would not be obligated to make time-
> window specific deliveries to the various customers, the
> company would be able to change their delivery routes freely
> to accommodate various factors such as: (1) changes to the
> number of customers on the route; (2) changes to the
> number of delivery trucks available on a given day; (3)
> inventory changes; and (4) changes to the number of
> delivery drivers available on a given day. (Page 14 of
> Applicant's response)

As explained in the art rejection, Borders provides the basis for a scheduling

system that schedules the delivery of multiple orders. The fact that some customers

have customer order histories and multiple deliveries may be aggregated into one

delivery signifies that a user may request multiple deliveries corresponding to different

orders and potentially on different days. Therefore, it is understood that the disclosed

scheduling methodology is utilized for each individual order and corresponding delivery

request (¶¶ 47, 57, 59, 64). Borders even plans scheduling in the context of time-

based delivery windows (see at least Fig. 13). In other words, Borders' scheduling

system is complex enough to handle the scheduling of multiple orders, thereby

accommodating the various factors raised by the Applicant. What is lacking from

Borders is that multiple, reoccurring deliveries can be scheduled for the same time

period, but for different days, through one single request. First, the recited "time

window" is a very broad concept. Any time spanning a given day is a "time window."

"During business hours," "from 8 a.m. to 10 a.m.," "before sunrise," and "between 7 a.m.

and midnight" all qualify as time windows corresponding to a given day. Applicant

admits that the article "E-Business in the New Beverage Marketplace" "describes a

milkman-type arrangement, where customers can request to be added to standard

delivery routes, but are not provided with the ability to specify when any of the deliveries

would be made." One of ordinary skill in the art understands that a "milkman-type

arrangement" implies a reoccurring delivery within a given time window. For example, a

milkman typically has a relatively fixed route; therefore, his/her customers know more or

less when to expect a daily milk delivery. Similar expectations of a delivery routine

occur with mail delivery, newspaper delivery, etc. Furthermore, a mail carrier delivers

the mail during his/her work hours. A morning newspaper deliverer typically delivers

his/her newspapers close to sunrise (i.e., before 8 a.m.). There is always an implied

time window for these types of routine deliveries. The claimed invention never imposes

any specific limitations on what a "time window" comprises nor how any such specific

limitations would alter the concept of optimizing multiple deliveries, as taught by

Borders. Turning again to the article "E-Business in the New Beverage Marketplace,"

the article discusses automatic replenishment programs provided by online grocers that

facilitate weekly or bi-weekly (i.e., regular) deliveries of specific items (¶ 46). The

claimed invention amounts to a simple modification of Borders that allows its customers

to set up reoccurring deliveries in one request, the concept of which is taught by the

article "E-Business in the New Beverage Marketplace" through the discussion of

automatic replenishment via the scheduling of regular (e.g., weekly or biweekly)

deliveries. Therefore, the Examiner maintains that the Borders-"E-Business in the New

Beverage Marketplace" combination does sufficiently address all of the claim limitations.

Applicant argues:

> Furthermore, there would have been no motivation to combine the very precise time-window specific delivery system taught in Borders with the more flexible system described in the E-business article. This lack of motivation would have been compounded by the substantial technical complexities that would have been associated with modifying the Borders system to perform as claimed in the present application. More particularly, because of the already complex nature of scheduling just a single delivery to be made within a particular time window, it would not have been obvious to modify the system of Borders to: (1) receive a single request from a user that a first delivery vehicle visit be made to the customer within a particular time window on a first day, and that a second vehicle delivery visit be made to the customer within said particular time window on a second day, and then (2) schedule the first and second delivery vehicle visits to be made within the particular time window (but on different days), as requested by the customer. This is made apparent by the complex technical and logistical steps that Borders teaches as being required to schedule a

> single delivery to be made within a time window on a
> specified day. Such steps are discussed at paragraphs 45-
> 93 of *Borders*. (Page 15 of Applicant's response)

Applicant's assertion that Borders is more complex than the teachings in "E-

Business in the New Beverage Marketplace" is irrelevant to whether or not the claimed

invention is obvious in light of the combination of the two references. Again, the fact

that some of Borders' customers have customer order histories and multiple deliveries

may be aggregated into one delivery signifies that a user may request multiple

deliveries corresponding to different orders and potentially on different days. Therefore,

it is understood that the disclosed scheduling methodology is utilized for each individual

order and corresponding delivery request (¶¶ 47, 57, 59, 64). In other words, Borders

effectively makes a determination that at least a first and a second delivery vehicle visit

can be scheduled and it finalizes a composite delivery schedule accordingly. The

claimed invention does not specify any complex calculations that simultaneously

integrate the schedule decisions associated with a first delivery as being directly

dependent on the scheduling of a second delivery or vice versa. As claimed, the

scheduling of the first delivery visit for a given time window follows a separate decision

path from that of the scheduling of the second delivery visit, albeit for the same given

time window on a different day. There is nothing special about how the two delivery

visits are scheduled for the same given time window. The underlying scheduling

methodology is the same as if two completely unrelated deliveries happened to be

requested for the same time window on two different days, regardless of who originates

each delivery request. The only common thread between the delivery of both delivery

visits is the fact that a user generate a single request specifying both visits. "E-Business in the New Beverage Marketplace" explains how "'automatic replenishment' programs that provide for weekly or bi-weekly delivery of specific items" were becoming popular with online grocers prior to Applicant's invention (¶ 46), thereby providing the motivation for one of ordinary skill in the art at the time of Applicant's invention to enhance Borders' invention by facilitating the scheduling of weekly or bi-weekly (i.e., regular) deliveries through a single request. The implication of an "automatic replenishment" program is that a customer can, though a single request, set up a delivery schedule of reoccurring deliveries. Further, as discussed above, the recited "time window" can span any general expectation of when delivery will occur within a given day. Such an expectation can vary anywhere from several minutes to most of the day.

On page 17 of Applicant's response, "Applicants respectfully request deferment of a final decision regarding a potential double patenting rejection until any allowable subject matter has been identified." This request is granted; however, the double patenting rejection will officially remain on record until obviated by a terminal disclaimer or through appropriate claim amendments.

Also, Examiner notes that, as per MPEP § 2144.03(C), the statements of Official Notice made in the art rejection have been established as admitted prior art since Applicant has not traversed the Examiner's assertions of Official Notice.

In summary, Applicant's arguments are not persuasive; therefore, the art rejection is maintained.

Claim Rejections - 35 USC § 103

3.   The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all

obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set
> forth in section 102 of this title, if the differences between the subject matter sought to be patented and
> the prior art are such that the subject matter as a whole would have been obvious at the time the
> invention was made to a person having ordinary skill in the art to which said subject matter pertains.
> Patentability shall not be negatived by the manner in which the invention was made.

4.   Claims 1-9, 32-36, 49-52, and 71-73 are rejected under 35 U.S.C. 103(a) as

being unpatentable over Borders et al. (US 2001/0047285) in view of the article "E-

Business in the New Beverage Marketplace."

Borders discloses a computer-readable medium for scheduling delivery vehicle

visits to a customer, said computer-readable medium comprising computer-executable

instructions for performing the steps of:

[Claim 1]   (1) receiving requests from a user that a first delivery vehicle visit be made

to said customer within a first particular time window on a first day, and that a second

vehicle delivery visit be made to said customer within a second particular time window

on a second day (¶¶ 47, 57, 59, 64 -- The fact that some customers have customer

order histories and multiple deliveries may be aggregated into one delivery signifies that

a user may request multiple deliveries corresponding to different orders and potentially

on different days. Therefore, it is understood that the disclosed scheduling

methodology is utilized for each individual order and corresponding delivery request);

(2) determining whether to schedule said first delivery vehicle visit within said first

particular time window on said first day (¶¶ 47, 57);

(3) determining whether to schedule said second delivery vehicle visit within said second particular time window on said second day (¶¶ 47, 57);

(4) in response to a combination of: (a) said request, and (b) a determination in Step (2) that said first delivery vehicle visit should be scheduled within said first particular time window on said first day, scheduling said first delivery vehicle visit to be made within said first particular time window on said first day (¶¶ 47, 57); and

(5) in response to a combination of: (a) said request, and (b) a determination in Step (3) that said second delivery vehicle visit should be scheduled within said second particular time window on said second day, scheduling said second delivery vehicle visit to be made within said second particular time window on said second day (¶¶ 47, 57);

[Claim 2]   wherein said Step (2) includes determining whether it would be possible to make said first delivery vehicle visit within said first particular time window on said first day (¶¶ 47, 57); and

Step (3) includes determining whether it would be possible to make said second delivery vehicle visit within said second particular time window on said second day (¶¶ 47, 57);

[Claim 3]   wherein said Step (2) includes determining whether it would be economically desirable to make said first delivery vehicle visit within said first particular time window on said first day (¶ 57 -- A cost module is used to help determine if a requested delivery is feasible on the desired date and time); and

Step (3) includes determining whether it would be economically desirable to make said second delivery vehicle visit within said second particular time window on

said second day (¶ 57 -- A cost module is used to help determine if a requested delivery

is feasible on the desired date and time);

[Claim 4]   wherein said first delivery vehicle visit is a first delivery (¶¶ 47, 57, 59,

64);

          said first delivery vehicle visit includes a first set of items (¶¶ 47, 57, 59, 64 --

The fact that some customers have customer order histories and multiple deliveries may

be aggregated into one delivery signifies that a user may request multiple deliveries

corresponding to different orders and potentially on different days);

          said second delivery vehicle visit is a second delivery (¶¶ 47, 57, 59, 64); and

          said second delivery includes a second set of items (¶¶ 47, 57, 59, 64 -- The fact

that some customers have customer order histories and multiple deliveries may be

aggregated into one delivery signifies that a user may request multiple deliveries

corresponding to different orders and potentially on different days);

[Claim 7]   wherein said computer-readable medium comprises computer-executable

instructions for performing Steps (1), (2), (3), (4), and (5) in real time (¶¶ 47, 57);

[Claim 8]   wherein said computer-readable medium further comprises computer-

executable instructions for displaying a confirmation message to said user confirming

that said first and second delivery vehicle visits have been scheduled, and wherein said

step of displaying a confirmation message is executed in response to a combination of:

          (a) said request;

          (b) a determination in Step (2) that said first delivery vehicle visit should be

scheduled within said first particular time window on said first day; and

(c) a determination in Step (3) that said second delivery vehicle visit should be

scheduled within said second particular time window on said second day (¶¶ 47, 88-

89).

Regarding claims 1-9, Borders discloses a scheduling system that allows

customers to schedule the delivery of an item each time an item is ordered. However,

Borders does not expressly teach that multiple, reoccurring deliveries (e.g., deliveries

on different days, but during the same particular time window) may be scheduled

through one request. The article "E-Business in the New Beverage Marketplace"

discusses various online grocers, including Webvan (the assignee of the Borders patent

application). This same article states the following regarding the practice of "automatic

replenishment":

> One solution employed by some online grocers has
> been to take impulse out of the equation altogether.
> 'Automatic replenishment' programs that provide for weekly
> or bi-weekly delivery of specified items achieve this. Repeat
> customers can get regular deliveries of Tab, for instance.
> Customer loyalty programs, such as small discounts, may
> provide the right incentive for people to sign up for this
> service. Such programs may also appeal to people as a
> convenient time-saver. (¶ 46)

Not only is Webvan (the assignee of the Borders patent application) mentioned in

the article "E-Business in the New Beverage Marketplace," but Borders also gives

delivery scheduling priority to its preferred customers. These customers include those

who have a high shipment frequency and volume (¶¶ 92, 96). For example, the more

"popular" delivery windows may be reserved for the higher ranking customers (¶ 128).

Clearly, Borders' invention aims at encouraging repeat business from its frequent and

high volume customers; therefore, the Examiner asserts that it would have been

obvious to one of ordinary skill in the art at the time of Applicant's invention to enhance

Borders' invention with the ability to provide customers with the option of requesting

reoccurring deliveries of the same items (as taught by the article "E-Business in the

New Beverage Marketplace") during the same particular time window, but on multiple

days (the capabilities of which are already presented in Borders) in order to encourage

repeat patronage from Borders' most profitable customers by offering them a more

convenient solution to scheduling reoccurring deliveries (as suggested by the article "E-

Business in the New Beverage Marketplace"). This modified version of Borders teaches

the following limitations: wherein said first set of items includes substantially all of the

items delivered during said first delivery (e.g., Tab soda) and said second set of items

includes substantially all of the items within said first set of items (e.g., a repeat weekly

or bi-weekly delivery of Tab soda), as per claim 5; and wherein said single request

comprises a definition of said first set of items (e.g., Tab soda), an indication that said

first set of items should be delivered within said particular time window on said first day

(e.g., Tab soda will be delivered this Monday between 8 and 10 am), and an indication

that said first set of items should be delivered, according to a reoccurring delivery

schedule, within said particular time window on at least one day other than said first day

(e.g., another shipment of Tab soda will be delivered the following Monday between 8

and 10 am), as per claim 6.

In reference to claim 9, Borders teaches the scheduling of the delivery of items, yet Borders does not expressly disclose the scheduling of a first and second pick-up. However, as part of its comparison of various online grocery services, the article "E-Business in the New Beverage Marketplace" also explains how the company ShopLink.com not only allows a customer to request a delivery of groceries, but it also facilitates dry cleaning (¶ 47). Furthermore, Official Notice is taken that it is old and well-known in the art to schedule a dry cleaning pick-up from a customer's location. This practice saves the customer the time of having to drop off his/her dry cleaning at the dry cleaner's location, thereby making the overall process more convenient to the customer. Also, it should be noted that a delivery truck's route is planned and scheduled similarly regardless of the actions to be performed at each stop since the actual routing is generally not affected by what the truck driver does upon reaching each location along the route, especially in the case of delivering or picking-up non-perishable goods. Therefore, the Examiner asserts that it would have been obvious to one of ordinary skill in the art at the time of Applicant's invention to utilize Borders' invention to schedule multiple pick-ups as well as deliveries in order to expand the services offered to its customers, thereby increasing Borders' customer base and potential for profit.

[Claims 32-36]   Claims 32-36 recite limitations already addressed by the rejection of claims 1, 4-7, and 9 above; therefore, the same rejection applies.

[Claims 49-52]   Claims 49-52 recite limitations already addressed by the rejection

of claims 1, 4, 5, 7, and 9 above; therefore, the same rejection applies.

[Claims 71-73]   Claims 71-73 recite limitations already addressed by the rejection

of claims 1-3 above; therefore, the same rejection applies.

Double Patenting

5.   The nonstatutory double patenting rejection is based on a judicially created
doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the
unjustified or improper timewise extension of the "right to exclude" granted by a patent
and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11
F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225
USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA
1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970);and, *In re Thorington,*
418 F.2d 528, 163 USPQ 644 (CCPA 1969).
      A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be
used to overcome an actual or provisional rejection based on a nonstatutory double
patenting ground provided the conflicting application or patent is shown to be commonly
owned with this application. See 37 CFR 1.130(b).
      Effective January 1, 1994, a registered attorney or agent of record may sign a
terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with
37 CFR 3.73(b).

6.   Claims 3 and 73 are rejected under the judicially created doctrine of

obviousness-type double patenting as being unpatentable over claims 1, 22, 29, 33, 53,

56, and 59 of U.S. Patent No. 6,701,299 in view of the article "E-Business in the New

Beverage Marketplace." The main difference between claims 3 and 73 of the instant

application and claims 1, 22, 29, 33, 53, 56, and 59 of U.S. Patent No. 6,701,299 is the

concept of scheduling reoccurring deliveries through one single request. However, as

discussed in the art rejection above, the article "E-Business in the New Beverage

Marketplace" explains how such an enhancement in light of claims 1, 22, 29, 33, 53, 56, and 59 of U.S. Patent No. 6,701,299 would be obvious.

Conclusion

7.   **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

8.   Any inquiry concerning this communication or earlier communications from the examiner should be directed to Susanna M. Diaz whose telephone number is (703) 305-1337. The examiner can normally be reached on Monday-Friday, 9 am - 5:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Tariq Hafiz can be reached on (703) 305-9643.

Any inquiry of a general nature or relating to the status of this application or

proceeding should be directed to the Receptionist whose telephone number is (703)

308-1113.
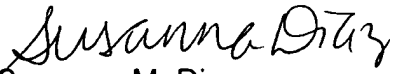
Any response to this action should be mailed to:

<div align="center">

Commissioner for Patents
P.O. Box 1450
Alexandria, Virginia 22313-1450

</div>

or faxed to:

(703) 872-9306   [Official communications; including
After Final communications labeled
"Box AF"]

(703)746-7048   [Informal/Draft communications, labeled
"PROPOSED" or "DRAFT"]

Hand delivered responses should be brought to Crystal Park 5, 2451 Crystal
Drive, Arlington, VA, 22202, 7th floor receptionist.

Susanna M. Diaz
Primary Examiner
Art Unit 3623
September 21, 2004